

Subject Index.

	Page
PETITION	1
Opinions below	2
Jurisdiction	2
Questions presented	3
Statute and law involved	3
Statement	3
Specifications of error now urged	7
Reasons for granting the writ	8
BRIEF	10
1. Conflict of the decision of the Appellate Court below with the decision of the Circuit Court of Appeals for the Fifth Circuit	10
2. The determination of the respondent in the case at bar and the decisions of the court below are violative of the rights "reserved to the states respectively, or to the people" under Article X of the Amendments to the Constitu- tion	17
Appendix	25

Table of Authorities Cited.

CASES.

Ellis v. Stevens , 37 F. Supp. 488	18
Erie R.R. Co. v. Tompkins , 304 U.S. 64	18
Frederich v. Commissioner , 145 Fed. (2d) 796	10, 12, 13, 15, 17, 23
Freuler v. Helvering , 291 U.S. 35	18
Hines v. Levers & Sargent Co. , 226 Mass. 214	23
Lyeth v. Hoey , 305 U.S. 188	18
Lyman v. Nat'l Bank of the Republic , 181 Mass. 437	16
Mass. Institute of Technology v. Attorney General , 235 Mass. 288	23

	Page
Mooers v. Greene, 274 Mass. 243	22
Ransom v. Commissioner, 2 T.C. 647	19
Welch v. City of Boston, 211 Mass. 178	23
Worcester County Nat'l Bank, Petitioner, 263 Mass. 444	20, 21

STATUTES.

Constitution of the United States, Amendments, Art. X	17
Internal Revenue Code, sec. 161(a)(3)	10
Mass. General Laws (Ter. Ed.) c. 195, sec. 7	13, 23
Regulations 94, Art. 162-1	10
Regulations 103, Sec. 19.162-1	11

TEXTBOOKS.

Mertens, Law of Federal Income Taxation, sec. 36.31	19
Newhall, Settlement of Estates and Fiduciary Law in Mass. (Third Ed.)	14, 16, 20
Restatement of Law, Conflict of Laws, sec. 519	21

MISCELLANEOUS.

L.O. 1051, 3 C.B. 205	19
-----------------------	----

Supreme Court of the United States.

OCTOBER TERM, 1947.

WILLIAM C. CHICK AND MABEL C. FOSS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUP- PORT THEREOF.

These cases were consolidated by order of The Tax Court of the United States, entered October 30, 1945, and were tried together on that date before Honorable C. Rogers Arundell, sitting at Boston, Massachusetts.

The petitioners by their counsel hereby pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above cases on February 27, 1948, affirming the decision of The Tax Court of the United States, promulgated December 31, 1946.

Opinions Below.

The majority opinion of The Tax Court of the United States appears on pages 37-45, inclusive, of the Record and is reported in 7 T.C. 1414. The minority opinion of The Tax Court of the United States appears at pages 45-48, inclusive, of the Record, and, of course, is reported with the majority opinion. The opinion of the Circuit Court of Appeals for the First Circuit appears at pages 122-129, inclusive, of the Record and has not as yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on the 27th day of February, 1948. The jurisdiction of this Court is invoked under Sections 161(a)(3) and 162(b) of the Internal Revenue Code and Article X of the Amendments to the Constitution of the United States. Before the Tax Court the respondent posited his case upon Section 162(b) of the Internal Revenue Code and Regulations 103, Section 19.162-1 (R. pp. 37-38). In the Appellate Court below respondent stated the jurisdictional question in the following language: "Was the Chick estate in the process of 'administration or settlement' during 1940 within the meaning of Section 161(a)(3) of the Internal Revenue Code and the Regulations promulgated thereunder?" The Appellate Court stated the issue as follows: "It is whether throughout the calendar year 1940 the estate of the petitioners' father, Isaac W. Chick, was in the process of 'administration or settlement' within the meaning of Section 161(a)(3) of the Internal Revenue Code and the Regulations promulgated thereunder and therefore constituted a taxable entity for income tax purposes during that year" (R. pp. 122, 123).

Questions Presented.

May income received in the tax year of 1940 by a probate estate still in process of administration lawfully be assessed to the beneficiaries of a residue trust created by the decedent's will but not actually set up or established and still a barren trust, and its validity still undetermined, upon the premise that the closing of the estate has been unduly delayed? This question in turn poses the further question: Do not the determinations of the respondent in the case at bar violate Article X of the Amendments to the Constitution of the United States in that such determinations or conclusions, and particularly the basic findings and rulings upon which they rest, are governed wholly by applicable state law?

Statute and Law Involved.

The pertinent provisions of Section 161(a)(3) and Section 162(b) of the Internal Revenue Code, Section 19.162-1 of Regulations 103, and Article X of the Amendments to the Constitution of the United States are fully set forth in the appendix hereto attached and made a part hereof.

Statement.

1. On March 7, 1929, Isaac W. Chick, a resident and a merchant of Boston, the father of the petitioners in these consolidated proceedings, deceased testate. His will, dated May 8, 1909, and the five codicils subsequently made and attached thereto were allowed for probate by the Probate Court for Suffolk County, Massachusetts, on March 28, 1929. The petitioner William C. Chick was named as sole executor under the will, and also was named and designated as sole trustee under various of the trusts

created both by the will and by the codicils thereto attached, including the residue trust. As executor, the petitioner Chick qualified at once, and shortly thereafter and on April 11, 1929, he qualified as trustee by giving the required bonds (R. p. 78). The petitioners herein are the only beneficiaries under the residue trust.

2. The value of the testator's estate at the time of his decease was approximately \$2,500,000 (R. p. 71).

3. At a time prior to May 28, 1931, the respondent asserted a deficiency estate tax of \$24,259.63. This claim so made by the respondent was subsequently and on May 28, 1931, compromised and settled. Later and on June 19, 1933, a refund of \$554.95 was made to the estate (R. p. 80).

4. The decedent owned at the time of his death, among other properties and securities, 2500 shares of the capital stock of the Atlantic National Bank of Boston. He was also at that time a director of that bank. Subsequent to the testator's decease, the 2500 shares were converted into 10,000 shares through the issuance by the bank of four shares for one. These 10,000 shares were held by the executor, the petitioner William C. Chick, who was made a director of the bank in the stead of his deceased father. In 1932 the bank was closed by the Controller of Currency. Later, the shares of the bank were declared valueless, and assessments were imposed upon the shareholders, and also upon the directors as such. The assessments and claims so made against the estate were finally settled in 1937 (R. p. 81).

5. The decedent, Isaac W. Chick, also owned at the time of his death 4000 shares in an incorporated retail floor covering business operated under the name of John H. Pray & Sons Company (R. p. 32). This business is one of the oldest retail floor covering businesses in the United States, having been started in 1817 and having operated continuously since then (R. p. 65). The decedent, Isaac

W. Chick, had been connected with the business for sixty years prior to his death (R. p. 65). In earlier years the business had been quite prosperous. During the depression years, however, the surplus of the Company had in a large measure been dissipated (R. p. 69). The neighborhood in which the business was located had changed in character. It is a stipulated fact that the neighborhood of the premises formerly occupied by the business "is now, and for a period of years past has been given over chiefly to bar-rooms and theatres and movie-playhouses more particularly of the cheaper types" (R. p. 79). It is also a stipulated fact that "For the period from 1932 down to and including the year 1940, with the exception of the year 1937, the Pray Company sustained operating losses each year. It was not until 1941 (the year following the tax year in controversy) that the Company had an operating profit, and since that time it has continued to operate profitably" (R. p. 79). It was further stipulated that "To overcome losses previously sustained by it and to pay expenses incident to its removal to a new location, and to provide it with additional working capital, the Company increased its capital on two different occasions by the authorization of preferred stock in the aggregate sum of \$400,000." These capital increases occurred in 1936 and 1939 (R. p. 79).

6. Of the preferred stock so authorized, \$75,000 of it was subscribed and paid for by the estate of the decedent. This sum represented the aggregate amount of income the estate had then received (R. p. 8). Of the remaining preferred stock, \$225,000 was subscribed and paid for by the petitioners, and the other \$100,000 of stock was never issued.

7. The losses sustained by the estate throughout the depression years, including the losses arising through the closing of the Atlantic National Bank and the shares held

by the estate in that bank becoming liabilities, had been so great that the shares of the Pray Company, in spite of the financial condition in which the Company at that time (1937) found itself, represented two-thirds of the liquidating value of the estate (R. p. 67).

8. The executor in the year 1937 was confronted with the question whether to liquidate the business, which at that time, in his opinion, could have been done only at a nominal value, or whether, on the other hand, he should try to restore the business to a better financial position with some of the prestige it had formerly held (R. p. 67). The executor did not believe that the business could be sold as a going concern, for the reason that the Company had for years been without a record of earnings (R. p. 67). Since its removal to its present location, and after the tax year in question (1940), the Company had prospered, and its financial position had greatly improved. The Company has now established a record of earnings (R. p. 67), and the executor is desirous of closing the estate (R. p. 70).

9. In 1936 the petitioner William C. Chick was stricken ill and went "to pieces" (R. p. 66). He was in the hospital and the doctor ordered him to "slow down" (R. p. 66). After returning from his illness in 1937, he "went around to some of the large trust companies and asked them if they would take over the trusteeship, that I [the petitioner Chick] wasn't able to do it," and hence he desired to have a trust company take over his duties under his father's will. In each of the trust companies he approached he was told that the company would accept the executorship and operate the business for a short while, but after such period the business would have to be sold or closed, and he was further told that under no circumstances would any of these trust companies undertake to operate and conduct the business as a trustee (R. p. 68). The petitioner Chick then considered what would prob-

ably happen were he to present his resignation as trustee to the Probate Court, and concluded that the Court would probably appoint an individual who perhaps would be a total stranger to the family, without any particular ability to run the business, and that such stranger would for the duration of the trusts be in charge of the family funds (R. p. 69). The petitioner Chick thereupon resolved to carry on the business as executor until he could find a successor to act as executor or trustee, or until such time as the Pray Company could establish a record of earnings.

10. In 1937, and following his return to the business after his illness, the petitioner William C. Chick, in behalf of the Pray Company, entered into negotiations for a lease of the premises on Tremont Street, Boston, which the Company now occupies. It took the better part of a year to make the necessary repairs. The Company moved to Tremont Street, Boston, in 1938 (R. p. 67).

11. The \$75,000 of estate income which the petitioner Chick, as the executor of his deceased father's estate, used in the year 1939 to purchase preferred stock in that amount of the Pray Company, to protect and preserve the estate's large interest in that Company, had not been liquidated prior to the tax year 1940, but was still outstanding throughout such year as an investment of the executor.

Specifications of Error Now Urged.

The Court of Appeals erred (a) in affirming the majority opinion of The Tax Court of the United States; (b) in holding that the income received by the Estate of Isaac W. Chick in the tax year 1940 was taxable to the petitioners; (c) in holding that the respondent may for tax purposes determine as a matter of law whether or not a probate estate is in process of "administration or settlement"; (d) in holding in substance that the respondent may for tax

purposes determine the legality of trusts, the rights, duties and obligations of a trustee under a trust, who the lawful beneficiaries of a trust are, whether trust income is currently distributable, whether trust income shall be subject to administration costs or charges, and the amount of income which could or should be distributed to each beneficiary, each and all of these questions being determinable wholly upon applicable state law.

Reasons for Granting the Writ.

Rule 38, Section 5, of the Rules of this Court specifies, as three of the classes of cases in which applications for writs of certiorari to a Circuit Court of Appeals will be considered, those—

“(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court;
. . .”

It is submitted that in the present case—

- (1) The decision of the court below very obviously is in conflict with the decision of the Court of Appeals for the Fifth Circuit in the case of *Frederich v. Commissioner*, 145 Fed. (2d) 796.
- (2) That the decision of the court below undertakes to and does decide questions which are determinable wholly under applicable state law, and decides them in a manner contrary to state law.

(3) That the questions here presented are of transcending importance in the realm of constitutional and tax law, and have not been, but should be, settled by this Court.

Respectfully submitted,
ROBERT A. B. COOK,
Attorney for Petitioners.

Of Counsel:

PHIPPS, DURGIN & COOK,
75 Federal Street, Boston, Massachusetts.

Brief in Support of Petition for Certiorari.**1. Conflict of the decision of the Appellate Court below with the decision of the Circuit Court of Appeals for the Fifth Circuit.**

The decision of the Appellate Court below very obviously conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Frederich v. Commissioner*, 145 Fed. (2d) 796. The facts in the *Frederich* case briefly are these: With the death of the petitioner's partner in 1934 the petitioner, as the surviving partner in the business, undertook to and did operate the partnership business until 1938 without any court order or authorization whatsoever. In 1938 the petitioner was appointed administrator of his deceased partner's estate, and thereupon an order was entered authorizing the petitioner to carry on the business as a partnership. As late as 1943 the business was still being operated with the approval of the court, and with the estate as a partner. All creditors of the business had been paid. All administrative acts except for the liquidation of the business had been performed. The heirs of the decedent were the only parties in interest in the estate, and they desired the business operated until such time as it could be advantageously sold. "None [of the heirs] wished the contrary" (p. 797). The Commissioner contended and the Tax Court held that the income derived by the estate, commencing with the tax year 1937, was income of the heirs and should have been so reported by them for the reason, as was alleged, that the performance of all ordinary duties pertaining to the administration of the estate ceased with the tax year 1936. The applicable statute was Section 161(a)(3) of the Internal Revenue Code, and the Regulations involved were Regulations 94, Art. 162-1, the forerunner of, and almost

identical with, Regulations 103, Sec. 19.162-1, construed in the case at bar.

In the decision of the Court (pp. 798 and 799) it was held:

"... the purpose seems to be definitely inferable that if the administrator actually requires, or consumes, a long period in administering the estate, then for such period the income shall continue to be charged to the estate and not diminished by splitting the tax liability among the heirs, as would happen in the event of a distribution. The onus of a delayed distribution of the assets of an estate is the taxation of income as a unit, and there seems to be no impelling reason, in the usual course of administration of estates, for Congress to seek to hasten the winding up of an administration, since, generally, as long as the undistributed income is taxable solely to the estate, the greater are the returns to the Government. It is our view, therefore, that Congress never intended, nor was the regulation ever designed, to evoke the construction which the Tax Court announced in this case. This conclusion becomes more apparent when the last sentence in the regulation is considered. Again the time is not defined as the period reasonably necessary to administer the estate, but it is the actual time, even if it is longer than the period specified in the statute for the settlement of estates. The Commissioner of Internal Revenue certainly was not vested with the power to determine that a state statute fixing the time for the winding up of an estate is unreasonable. The Legislatures of the states clearly have the right to prescribe the period in which estates must be wound up, and neither by Congressional enactment nor departmental regulation would such a statute be declared unreasonable. Such statutes will be deemed reason-

able, but the reasonableness of the period fixed by such statute is not the criterion fixed by the regulation. On the contrary, 'It is the time actually required' for the settlement of estates whether that period be longer or shorter than the presumably reasonable period specified in the local statute.

"(4) It seems clear that the act and also the regulation each contemplates that during the period that the estate is actually under administration and unsettled the income shall be reported by, and the undistributed portion thereof taxed to, the estate."

When the case at bar was before the Tax Court, the latter in its majority opinion contented itself with this generalization in considering the authoritativeness of the *Frederich* case, *supra* (R. pp. 40-41):

"Petitioners rely strongly on the Fifth Circuit's reversal of the decision in the *Frederich* case. See *Frederich v. Commissioner*, 145 Fed. (2d) 796. We have carefully read the court's opinion in that case and if it is, as petitioners contend, to be construed as holding that Regulations 103, Section 19.162-1 is invalid as applied to a state of facts such as we have in the instant case, then with all due respect to the court we are unable to agree."

In the dissenting opinion handed down by Arundell, J., concurred in by Tyson, J., it was said:

"I think the Circuit Court of Appeals for the Fifth Circuit took the proper view of the matter in *Frederich v. Commissioner*, 145 Fed. (2d) 796, reversing 2 T.C. 936, when it held that the period contemplated by the statute and by the regulations is the period during which the estate is actually in the process of ad-

ministration under the laws of the state, absent fraud, conspiracy to evade taxes, or other serious irregularity. By design, or at least by necessary implication, the provisions relating to the taxation of estates and trusts depend in their application upon the state laws and processes, and, as the Circuit Court observed in the *Frederich* case, the onus of a delayed distribution of an estate's assets is the taxation of the income as a unit during the period of actual administration. Here there is no suggestion that this was a scheme or device designed for the purpose of defrauding the Federal Government."

The Appellate Court below in treating with the *Frederich* case held it distinguishable because there a court order for the operation of the business had been secured, whereas in the instant case ". . . the probate court was not asked to take and did not take any affirmative action of any kind with respect to continuing the administration of the estate here involved" (R. p. 128). If one is to infer from this statement that the Massachusetts Probate Court could, like the Florida court, empower an administrator or executor to operate a business indefinitely, then this is not a correct interpretation or construction of the local law.

Under Section 7 of Chapter 195 of the General Laws of Massachusetts (Ter. Ed.), and as it existed prior to an amendment made in 1945, not here material, it was provided:

"The probate court, upon such notice as it considers reasonable, may authorize an executor or administrator to continue the business of the deceased for the benefit of the estate for a period not exceeding one year from the date of his appointment."

Here is stated the maximum authorization which can possibly be judicially conferred in Massachusetts upon a fiduciary with respect to the continuation of a decedent's business. However, the adjective law of Massachusetts well complements this organic law.

Newhall on Settlement of Estates and Fiduciary Law in Massachusetts (Third Edition) pp. 209-210, states:

"Ordinarily an executor or administrator has no authority to continue the business of the deceased. If he does so on his own responsibility, he must make good all losses thereby incurred, while any profits made accrue to the estate. Also contracts made by him while so doing are his personal contracts, and his creditors cannot proceed against the estate. There are, however, exceptions to the strict rule as stated above. If the court is satisfied that the executor or administrator acted in good faith and for the best interests of the estate, *although without authority of any sort*, and if it appears that although losses were incurred, greater losses were avoided, the court will uphold his conduct and allow him credit for the losses in his account. . . .

"There are several ways in which the executor or administrator may be authorized to carry on the business. First, the will may authorize or direct it. Second, *the heirs or devisees may consent to it*. Third, the probate court has the power, in any case where it deems it advisable, to authorize an executor or administrator to continue the business of the deceased for the benefit of the estate for a period not exceeding one year from the date of his appointment. In any of the foregoing cases, if the executor or administrator incurs losses while acting in good faith, he is entitled to protection or reimbursement out of the assets of the estate." (Italics supplied.)

A court order in Massachusetts, therefore, is not a prerequisite to the lawful operation of a decedent's business, and assuredly a business can here be operated "without authority of any sort" if the heirs or devisees consent to it. In the case at bar there are only two persons in interest. They are the petitioners in this proceeding, and they have consented to the operation of the business by the executor and are protesting the determinations and conclusions of the respondent. *It follows, therefore, that in Massachusetts there can here be legally performed what perhaps can only be done legally in other jurisdictions under a judicial order.* Upon the underlying question, the two cases, the *Frederich* case and the instant case, are thoroughly parallel and cannot be distinguished upon this point as was attempted by the Appellate Court below.

It would hardly seem that the words of the Appellate Court to the effect—

"... in the absence of explanation by the petitioners we are as much at a loss as the Tax Court to understand why he could not control the affairs of that corporation for his, his sister's and their descendants' ultimate benefit fully as well by voting its stock as trustee as he could by voting its stock as executor" (R. p. 129)—

could possibly have any pertinency on the question here presented. But, if we are wrong in this assumption, then again has the court restricted its views with respect both to the facts and to the state law! The operation of the business has at all times been merely an incident to the executor's real objective, *i.e.*, making an advantageous sale of the business as a going concern, and so enabling the estate to be closed. The executor was stricken ill in 1936. He had been in the hospital and had been advised by his doctor to "slow down." He wanted to get out of the busi-

ness and close his father's estate (R. pp. 66-70, incl.). It was the sale of the business as a going concern that the executor was seeking. He knew from experience that only losses were to be sustained in its operation unless some radical changes were made, either in the character or in the location of the business. Under Massachusetts law an executor has greater power in the disposition of estate property than has a trustee. Newhall (Third Edition), at page 216, recites:

"... the executor or administrator has the absolute legal right to sell and dispose of all the personal property of the estate that comes into his possession, without any license of the court. He may sell either at public auction or by private sale, and unless the buyer has knowledge of some unlawful purpose of the executor or administrator, or participates in some wrongdoing, he gets an absolutely good title." *Lyman v. National Bank of the Republic*, 181 Mass. 437, and cases cited in footnote 7, page 216, Newhall (Third Edition).

And, at page 881, it is said:

"A trustee differs from an executor or administrator in that apart from statute he has, by virtue of his office, no power of sale, even of the personal property; as the original theory of trusts contemplated the holding of the property by the trustee. In Massachusetts this difficulty has been partially met so far as personal property is concerned by a statute providing that a trustee may change investments, and for that purpose may make sales and transfers of personal property, unless the trust instrument contains some provision to the contrary or it would be inconsistent with the purposes of the trust.

"This statute does not apply to real estate, and does not go the whole distance as to personal property."

With the similarity of the facts in each of the two cases, with both of them suspended from the same section of the Internal Revenue Code, with the executor in each case inspired by the same motive, seeking to accomplish the same end, and operating his decedent's business under adequate legal authority, it cannot fairly be said that the decisions of the courts in the *Frederich* case and the instant case do not definitely conflict.

2. *The determination of the respondent in the case at bar and the decisions of the court below are violative of the rights "reserved to the states respectively, or to the people" under Article X of the Amendments to the Constitution.*

A. The petitioners acknowledge and fully respect the great powers conferred upon the Congress to enact and enforce income tax laws, but these powers are not absolute; they are qualified, and as so qualified the acts of the respondent in this case are without validity.

Can it be fairly said that the Congress, or any federal administrative agency, deriving its power from Congress, may, for tax purposes, (a) interpret and construe trusts and determine their validity under state law; (b) determine the beneficiaries lawfully entitled to the income from the trusts; (c) whether such income is currently distributable; (d) the cost and charges properly allowable in connection with the administration of the trusts; and (e) the net income which each beneficiary could or should receive from the trusts. The petitioners submit that these questions have been answered in the negative time and again by this Court. Among the more recent decisions are *Erie*

R.R. Co. v. Tompkins, 304 U.S. 64; *Freuler v. Helvering*, 291 U.S. 35, and *Lyeth v. Hoey*, 305 U.S. 188. In *Erie R.R. Co. v. Tompkins* Mr. Justice Brandeis, speaking for this Court, at page 79, said:

“Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.”

It is a play upon words to assert that the Commissioner is not here attempting to exercise a degree and a very considerable degree of supervision over both legislative and judicial action of the states. And, moreover, the decisions of this Court have been openly flaunted. In both *Freuler v. Helvering*, *supra*, and *Lyeth v. Hoey*, *supra*, it was distinctly held by this Court that whether income of a trust is or is not currently distributable is wholly a question of local law.

In our own First Circuit, the federal rule was stated by Brewster, J., sitting in the District Court of the United States for the District of Massachusetts in the case of *Ellis v. Stevens*, 37 F. Supp. 488-491, as follows:

“The long-established rule is that an accounting by an administrator, or executor, is exclusively a matter for the probate court having jurisdiction over the estate. Probate of estates of deceased persons is regarded as being in the nature of a proceeding in rem, wholly statutory and exclusively within the province of the tribunal set up by the state for dealing with matters of probate. The federal courts, therefore, are

without jurisdiction to interfere with the decrees of the probate court" (and cases there cited).

Patently enough, under the federal rule, all questions relating to the matter of accountancy and to the right of beneficiaries to receive income are determinable solely under applicable state law. The Tax Court at one time so held in *Ransom v. Commissioner*, 2 T.C. 647, where it quoted from the text of Mertens' Law of Federal Income Taxation, Section 36.31, as follows:

"Simply because a will provides for a trust it will not be held that the tax should be computed on the basis that the income is that of a trust instead of an estate during the period of administration or settlement."

And then, too, we have a very forceful, pertinent opinion written by the Solicitor to the Commissioner, designated as L.O. 1051, 3 C.B. 205, where it was determined:

"Under a will creating a trust of the residuary estate, and directing the payment of part of the income thereof to specified individuals, the trust being created only at the expiration of administration, the right to the trust fund income accrues only at that time. No part is taxable to the beneficiary during administration, but the whole is taxable to the estate. Similarly, where the will creates a right in the legatee to income from the date of death, since such income is not payable until completion of administration, and until that time the property producing the income is part of the estate in process of administration."

The Supreme Judicial Court of Massachusetts has spoken very forcibly on the rule here stated. In *Worcester County National Bank, Petitioner*, 263 Mass. 444, at 459-460, Mr. Chief Justice Rugg, delivering the opinion of the Court, said:

"We understand that it has always been held by the Supreme Court of the United States that the Congress is prohibited by the Constitution of the United States from exercising judicial functions. *Kilbourn v. Thompson*, 103 U. S. 168, 190, 191. *Ocampo v. United States*, 234 U. S. 91, 100. *Ex Parte Grossman*, 267 U. S. 87, 119, 120. *Cosmopolitan Trust Co. v. Mitchell*, 242 Mass. 95, 115, 116. *Springer v. Government of the Philippine Islands*, 277 U.S. 189.

"This mandate of said § 3 not only is addressed to a judicial function but it relates to a subject outside the field of Congressional legislation. It seems to us not open to debate that the general subject of the settlement of estates of deceased persons and the appointment of fiduciaries to administer trusts is within the exclusive jurisdiction of the State. No clause of the Constitution of the United States confers any such power upon the Congress. Art. 1, § 8. That power is not forbidden to the States. Art. 1, § 10. It is a matter purely of State rather than of national cognizance. It falls among the powers reserved to the States by art. 10 of the Amendments."

In Newhall, *Settlement of Estates and Fiduciary Law in Massachusetts*, at page 46, it is recited:

"The settlement of the estate of a deceased person is absolutely in the exclusive jurisdiction of the probate court, and other courts must keep hands off and not attempt to interfere.² This is a rule which should

be carefully kept in mind, as frequently the attempt to oust the probate court of the proper jurisdiction is indirect and not readily apparent."

In footnote 2, referring to the quotation above, it is said:

"This is a fundamental principle of probate law, and there are many cases in the preceding section which illustrate it."

The rule so laid down in the cases and in the text above cited finds ample support in the Restatement of the Law, Conflict of Laws, Section 519, where it is provided:

"An administrator appointed in a state is accountable to the court which appointed him for all assets of the decedent which have come into his possession as administrator of that court and all assets of the decedent which he should have obtained in the discharge of the duties of his office.

• • • • •
"In the matter of accountability, as in other matters of administration, the law governing is that of the state of appointment."

B. The applicable Massachusetts law is no less clear and unequivocal than are the words of the Chief Justice in the *Worcester National Bank* case, *supra*. Under Massachusetts law a testamentary trust cannot have existence until the executor has first filed his account and the account has been allowed. Then and not until then can the testamentary trust be established, and until it is so established there cannot be income lawfully distributable there-

under. Said the Supreme Judicial Court of Massachusetts in the case of *Mooers v. Greene*, 274 Mass. 243:

"The case falls within the general rule that an executor who is also a trustee under a will cannot be considered as acting under the power given by the trust until he has settled his account as executor in the Probate Court."

The facts in *Mooers v. Greene* are of particular interest here. One Greene deceased testate in March of 1926. Mooers was designated executor under the will and he and a nephew of the decedent were appointed trustees. The trustees were authorized to operate the business of the decedent for an indefinite period of time. The nephew resigned as co-trustee. Mooers never qualified as trustee. However, as executor, he did operate the business and continued this operation beyond the statutory period of one year. The question presented in the case is: Did the executor lawfully conduct the business after the year period had expired, and if not, should he not be chargeable with the losses which were thereafter sustained in the course of the conduct of the business? Said the Court, at page 253:

"It is obvious that it was the duty of the executor, after the refusal of Greene to purchase, to administer the estate to its best advantage, and that he should not be charged with the expense of conducting the business and disallowed his charges for services rendered after April 1, 1927, if such items were properly paid out by him in the operation of the business and were not unreasonable. Here the executor continued the business from April 1, 1927, to March 1, 1928, [p. 254] when it was sold as a going concern at a price which was a substantial gain to the estate after de-

ducting all proper and reasonable charges for the conducting of the business and for services rendered by the executor in its management. In the circumstances here disclosed we think the executor rightly could be found to have acted not improperly and that his account should be allowed."

Here we have a judicial determination recognizing the propriety and legality of the operation of a decedent's business by an executor notwithstanding the limitations upon judicial powers contained in Section 7 of Chapter 195 of the General Laws of Massachusetts (Ter. Ed.), hereinbefore referred to. Again, and under Massachusetts law, executors are taxable as such even on property received by them as trustees until their executors' accounts are filed and allowed.

Welch v. City of Boston, 211 Mass. 178.

Mass. Institute of Technology v. Attorney General, 235 Mass. 288.

Hines v. Levers & Sargent Co., 226 Mass. 214.

The local law of Massachusetts was recognized and accepted in the dissenting opinion of Arundell, J., before whom these cases were tried in the Tax Court, concurred in by Tyson, J.

C. In conclusion your petitioners respectfully submit that the determinations of the respondent and the decisions, both of the Tax Court and of the Appellate Court below, are directly in conflict with the decision in the case of *Frederich v. Commissioner*, *supra*; that the statutory rights reserved to states respectively or to the people have been violated, and the question involved is one of such transcending importance in the federal law generally, and

in the realm of constitutional and tax law particularly,
that it should be reviewed and resolved by this Court.

Respectfully submitted,

ROBERT A. B. COOK,

Attorney for Petitioners.

Of Counsel:

PHIPPS, DURGIN & COOK,

75 Federal Street, Boston, Massachusetts.

Appendix.*Internal Revenue Code.***SEC. 161. IMPOSITION OF TAX.**

(a) *Application of Tax.*—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

• • • • •
(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

• • • • •
(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

Treasury Regulations 103, Promulgated under the Internal Revenue Code.

SEC. 19.162-1. *Income of estates and trusts.* . . .

From the gross income of the estate or trust there are also deductible (either in lieu of, or in addition to, the deductions referred to in the preceding paragraph of this section) the following:

(2) Any income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to a beneficiary, whether or not such income is actually distributed.

Any amount described in paragraph (2) or (3) of this section as being deductible from the gross income of the estate or trust shall be included in computing the net income of the legatees, heirs, or beneficiaries, whether distributed to them or not.

The income of an estate of a deceased person, as dealt with in the Internal Revenue Code, is therein described as received by the estate during the period of administration or settlement thereof. The period of administration or settlement of the estate is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. If an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. . . .

*Constitution of the United States.***ARTICLE X OF THE AMENDMENTS.**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.